

**A Johandra Realty Sdn Bhd & Anor v Ketua Pengarah Jabatan
Pengairan dan Saliran Malaysia & Ors**

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 21NCVC-11-03
OF 2014
ABDUL MAJID JC
14 MARCH 2017

C *Evidence — Witness — Expert witness — Plaintiffs sued defendants for trespass of land and claimed for general and exemplary damages — Plaintiffs relied on evidence of expert witnesses — Whether evidence of expert witness challenged by defendants*

D *Land Law — Trespass — Damage — Plaintiffs sued defendants for trespass of land and claimed for general and exemplary damages — Whether defendants committed trespass over plaintiffs' land — Whether damages proven — National Land Code ss 49 & 382A*

E The plaintiffs were the owners of five parcels of land located in Pontian, Johor ('the said land'). The first defendant acquired some parts of the said land for the construction of earth embankment along Sungei Pinggan and realignment of the same. The present action was filed by the plaintiffs against the defendants seeking, inter alia, for: (a) general damages for: overutilised of 3.7373 acres of their land since 1967 until the filing of the writ; and trespass over 16.7895 acres by using those areas as floodplain; (b) damages for loss of future income and/or income from the damaged oil palm plantation and coconut; (c) aggravated and exemplary damages; and (d) costs. The issues arose were whether the defendants had committed trespass over the 3.7373 acres of the said land by overutilisation; and the remaining 16.7895 acres of the said land which were not acquired.

H **Held**, allowing the plaintiffs' claim with costs of RM100,000:

I (1) The plaintiffs' witnesses, PW3 and PW10 were no doubt expert in their respective field and the court had no reason to reject their evidence particularly when the defendants did not bring any expert to rebut them. Further, there was nothing improbable in the evidence of PW3 and PW10 as they were not seriously challenged in cross-examination (see paras 28–29).

- (2) There was no evidence mentioning that the memorial as stated under s 382A of the National Land Code had been made. Therefore, the defence of the land being reverted and vested in the state authority could not succeed (see para 31). A
- (3) Based on the evidence of the government officials from the 'Pejabat Tanah Daerah Pontian', 'Jabatan Pengairan dan Saliran Pontian' ('JPSP') and the 'pelan-pelan akui' issued by and approved by the 'Pengarah Jabatan Ukur Johor', there was clear evidence of overutilisation and trespass of the 3.7373 acres and trespass over the 16.7895 acres of the said land; and the damages were proven. The court further found that the first defendant was liable and the third defendant was vicariously liable over the acts of the first defendant (see paras 33 & 36). B
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- (4) The state of affairs remained until today, therefore the trespass was continuing. Further, the plaintiffs requested that the land to be further acquired and JPSP also made similar recommendation but was ignored. As such, the court found that this was a fit case for exemplary damages to be awarded (see para 35). D

[Bahasa Malaysia summary]

Plaintif-plaintif ialah pemilik-pemilik lima bidang tanah yang terletak di Pontian, Johor ('tanah-tanah tersebut'). Defendan pertama telah memperoleh sebahagian daripada tanah-tanah tersebut untuk pembinaan tambak tanah sepanjang Sungei Pinggan dan penyusunan semula yang sama. Tindakan ini telah difailkan oleh plaintiff-plaintif terhadap defendan-defendan memohon, antara lain, untuk: (a) ganti rugi am bagi: 3.7373 ekar tanah mereka yang terlampau digunakan sejak 1967 sehingga pemfailan writ itu; dan pencerobohan ke atas 16.7895 ekar dengan menggunakan kawasan-kawasan tersebut sebagai dataran banjir; (b) ganti rugi untuk kehilangan pendapatan masa hadapan dan/atau pendapatan daripada minyak yang rosak daripada ladang kelapa sawit dan kelapa; (c) ganti rugi tambahan dan teladan; dan (d) kos. Isu-isu yang timbul adalah sama ada defendan-defendan telah melakukan pencerobohan ke atas 3.7373 ekar tanah-tanah tersebut kerana terlebih guna; dan 16.7895 ekar lagi tanah-tanah tersebut tidak diperolehi. E
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Diputuskan, membenarkan tuntutan plaintiff-plaintif dengan kos RM100,000: H

- (1) Saksi-saksi plaintiff, PW3 dan PW10 tanpa ragu adalah pakar dalam bidang masing-masing dan mahkamah tiada sebab untuk menolak keterangan mereka khususnya apabila defendan-defendan tidak membawa mana-mana pakar untuk membantah mereka. Selanjutnya, tiada yang tidak mungkin dalam keterangan PW3 dan PW10 kerana ia tidak dicabar secara serius dalam pemeriksaan balas (lihat perenggan 28–29). I

- A** (2) Tiada keterangan dinyatakan bahawa memorial yang dinyatakan di bawah s 382A Kanun Tanah Negara telahpun dibuat. Oleh itu, pembelaan tanah-tanah tersebut dikembalikan dan terletak hak kepada pihak berkuasa negeri (lihat perenggan 31).
- B** (3) Berdasarkan keterangan pegawai kerajaan daripada ‘Pejabat Tanah Daerah Pontian’, ‘Jabatan Pengairan dan Saliran Pontian’ (‘JPSP’) dan ‘pelan-pelan akui’ yang telah dikeluarkan oleh dan diluluskan oleh ‘Pengarah Jabatan Ukur Johor’, terdapat keterangan jelas kegunaan yang berlebihan dan pencerobohan 3.7373 ekar tanah-tanah tersebut; dan ganti rugi telah dibuktikan. Mahkamah selanjutnya mendapati bahawa defendan pertama bertanggungjawab dan defendan ketiga bertanggungjawab secara vikarius ke atas tindakan defendan pertama (lihat perenggan 33 & 36).
- C**
- D** (4) Keadaan urusan kekal sehingga hari ini, oleh itu pencerobohan berterusan. Selanjutnya, plaintif-plaintif meminta agar tanah-tanah tersebut diperoleh selanjutnya dan JPSP juga membuat syor yang sama tetapi tidak dihiraukan. Oleh itu, mahkamah mendapati bahawa ia adakah kes yang sesuai untuk ganti rugi teladan diawardkan (lihat perenggan 35).]
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Notes

For cases on damage, see 8(2) *Mallal’s Digest* (5th Ed, 2017 Reissue) paras 5915–5916.

- F** For cases on expert witness, see 7(2) *Mallal’s Digest* (5th Ed, 2017 Reissue) paras 3552–3561.

Cases referred to

- Cassell v Broome* [1972] AC 1027, HL (refd)
- G** *Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408, CA (refd)
- PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417; [2000] 4 CLJ 811, CA (folld)
- Rookes v Barnard* [1964] AC 1129, HL (folld)
- H** *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515, CA (refd)
- Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19, FC (refd)
- Tan Wee Choon v Ong Peck Seng & Anor* [1986] 1 MLJ 322 (refd)
- Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915, CA (refd)

I Legislation referred to

National Land Code ss 9, 49, 382A

Shamsul bin Bolhassan (Senior Federal Counsel, Attorney General’s Chambers) for the appellants.

Roger Chan Weng Keng (Julie Lim with him) (Julie Lim, Vasanthan & Co) for the respondents. A

Abdul Majid JC:

INTRODUCTION B

[1] The first plaintiff is a company whilst the second plaintiff is its managing director. They initiated this action against the three defendants seeking, inter alia, for:

- (a) general damages for: C
 - (i) overutilised of 3.7373 acres of their land since 1967 until the filing of this writ; and
 - (ii) trespass over 16.7895 acres by using those areas as floodplain; D
- (b) damages for loss of future income and/or income from the damaged oil palm plantation and coconut;
- (c) aggravated and exemplary damages; and E
- (d) costs.

[2] The defence by the defendants are that the allegedly overutilised land amounting to 3.7373 acres have reverted and vested in the state authority and hence, there is no trespass whilst the 16.7895 acres used as floodplain is water reserve therefore, similarly no trespass is being committed. F

BACKGROUND FACTS

- [3] The plaintiffs are owners of five parcels of land namely: G
- (a) Geran 85003 for Lot 2193 (Lot 3749 after acquisition) Mukim Sungei Pinggan, Daerah Pontian, Negeri Johor, (which original area was approximately 13 acres 00R. 17P);
 - (b) Geran 85007 for Lot 2194 (Lot 3752 after acquisition) Mukim Sungei Pinggan, Daerah Pontian, Negeri Johor, (which original area was approximately 17 acres 03R. 20P); H
 - (c) Geran 85008 for Lot 2195 (Lot 3754 after acquisition) Mukim Sungei Pinggan, Daerah Pontian, Negeri Johor, (which original area was approximately 19 acres 2R. 24P); I
 - (d) Geran 85009 for Lot 2196 (Lot 3817 after acquisition) Mukim Sungei Pinggan, Daerah Pontian, Negeri Johor, (which original area was approximately 11 acres 03R. 12P); and

A (e) Geran 83796 for Lot 2199 (Lot 3439 after acquisition) Mukim Sungei Pinggan, Daerah Pontian, Negeri Johor, (which original area was approximately 25 acres 01R. 30P).

B [4] The first defendant acquired some parts of the land from the previous owner in stages from 1967–1982 for the construction of earth embankment along Sungei Pinggan and realignment of the same. The first plaintiff purchased Lots 2193, 2194, 2195, 2196 and 2196 ('the land') in 1989 while the second plaintiff purchased part of Lot 2193 in 2013. It is not disputed that
C when the land were purchased by the plaintiffs there were no new titles issued after the same were acquired.

ISSUES

D [5] Before I proceed to state further I must place on record that the trial was heard by my predecessor and I only heard the submissions. I did not see and hear the witnesses and my decision is purely based on the submissions and the evidence as recorded.

E [6] The issues to be adjudicated upon in this action are as follows:

- (a) whether the first defendant in overutilising part of Lots 2193, 2194, 2195, 2196 and 2199 belonging to the plaintiffs amounting to 3.7373 acres have committed trespass;
- F (b) whether the first defendant in committing the alleged trespass has caused severe damage to the said 3.7373 acres;
- (c) whether the first defendant, the second defendant and the third defendant are jointly or severally liable for the alleged trespass and
G damage done and continuing over:
 - (i) the 3.7373 acres by overutilisation; and
 - (ii) the remaining Lots 2193 (3749), 2194 (3752), 2195 (3754) and 2196 (3817) which are not acquired amounting to 16.7895 acres
H used as floodplain;
- (d) whether the first defendant has committed trespass over the remaining Lots 2193 (3749), 2194 (3752), 2195 (3754) and 2196 (3817) which are not acquired amounting to 16.7895 acres;
- I (e) whether the first defendant in committing the alleged trespass has caused severe damage to the remaining Lots 2193 (3749), 2194 (3752), 2195 (3754) and 2196 (3817) which are not acquired amounting to 16.7895 acres; and

- (f) whether the first defendant, the second defendant and the third defendant are jointly or severally liable to pay damages to the plaintiffs for the alleged trespass and damage done and continuing over:
- (i) the 3.7373 acres by overutilisation; and
- (ii) the remaining Lots 2193 (3749), 2194 (3752), 2195 (3754) and 2196 (3817) which are not acquired amounting to 16.7895 acres.

[7] The defendants while admitting that the 16.7895 acres of the land are being used as floodplain but being a river reserve, they commit no trespass. As for the 3.7373 acres, the defendants are contending that they are state land.

ANALYSIS AND DECISION

The plaintiff's case

[8] On 16 June 2012 the second plaintiff ('PW2') wrote a letter to the Pejabat Tanah Daerah Pontian ('the PTP') requesting for the new titles in continuation to the said land to be issued. PW2 did not receive any response from the PTP instead he received a copy of a letter dated 22 October 2012 ('exh P10') from the Pengarah Tanah dan Galian Negeri Johor ('the PTG') through its Penolong Pengarah (Pendaftaran Hakmilik) informing and seeking confirmation from the PTP of a shortfalls of 0.6669 hectares representing 29% of Lot 2193 and 0.3803 hectares representing 8.9% of Lot 2196 after the final survey was conducted subsequent to the acquisitions. The maker of exh P10 (PW4) gave evidence and confirmed the shortfalls as stated in exh P10.

[9] PW2 thereafter made further inquiries and discovered there were also shortfalls in respect of Lots 2194, 2195 and 2199. He wrote a letter dated 9 April 2013 to the PTP and furnished the PTP the certified plan ('exh P11') approved by the Pengarah Jabatan Ukur Johor. He further wrote to the PTP ('exh P14') seeking for the status and the progress of the matter and the PTP responded vide a letter dated 15 July 2013 ('exh P15') stating that the PTP had requested the Jabatan Penilaian Negeri Johor to obtain the exact valuation to enable the first defendant to prepare the budget to make payment to the plaintiffs. It was also enclosed in the response a copy of the PBT report ('exh P17'). Apparently there was a typographical error of which corrections have been made and the corrected PBT report was tendered and marked as exh P13.

[10] The PTP vide letter dated 31 July 2013 addressed to the District Engineer of the Jabatan Pengairan Dan Saliran Pontian ('the JPSP') a copy of which was sent to PW2 ('exh P16') requesting the latter to carry out further acquisition of the encroached areas. Investigations were conducted the JPSP

- A and they came up with a report confirming the said encroachment and the shortfalls vide a letter dated 23 September 2013 copied to PW2 (exh P18 column 11). This part covers the 3.7373 acres.
- B [11] The relevant map for purposes of identification of the affected areas is exh P12 which shows the green coloured area representing the overutilised or encroachment whilst the red coloured area representing the floodplain. The JPSP vide letter dated 20 June 2013 addressed to the state director ('exh P20') certified that as a result of the construction of the embankment the original
- C land were split into two which had caused the remaining of the unacquired land coloured in yellow (areas coloured in red in P12) exposed to overflow during high tide and recommended that the land be acquired. This part covers the 16.7895 acres.
- D [12] According to PW2, he requested that the affected areas to be acquired because they were submerged most of the time and could not put into use and he thought they were not theirs earlier on until the discovery in 2012 and confirmed by the government officials. He claimed that the plaintiffs suffered loss of land use as a result of the damage done. PTP vide a letter dated 26 July
- E 2013 wrote to the Pengarah Jabatan Penilaian dan Perkhidmatan Harta Johor Bharu requesting for valuation report clearly admitted that the green coloured area as shown in the map enclosed which was similar to exh P12 that it represented the overutilised/encroached area (exh P53).
- F [13] As a result of all these correspondence, PW2 requested for a meeting with the officials from PTP and PTG. Several other meetings were held and there was no dispute as to the said overutilisation of 3.7373 acres. As for the alleged trespass of 16.7895 acres used as floodplain, the meeting decided that
- G this matter be referred to the headquarters in Putrajaya.
- H [14] In answer to a question from the court, PW2 said that when the plaintiffs bought the land they did not know that the area outside the embankment were part of the land because there was a signboard put up by JPSP prohibiting trespassers in Lot 2194. So the plaintiffs were under the impression that those areas were also acquired. Perhaps it should be mentioned here that the said signboard, after this suit was filed, was removed and placed in a different location outside the land. PW2 lodged a police report — see exh P44B.
- I [15] Learned counsel for the defendants in cross-examining PW2 attempted to establish that the embankment which act as a buffer was for the benefit of Kampung Benut residents and that PW2 merely assumed his land were used a floodplain. He then specifically put to PW2 the following:

PD1: I put it to you that your land was never used as floodplain?

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PW2: Not, I don't agree, can I refer you to ...

(NOP p 83 line 37–39).

This line of questioning is puzzling as it is inconsistent with the stand taken by the defendants in the statement of agreed facts. No doubt in para 19 of the statement of defence they denied and put the plaintiffs to strict proof but to my mind the statement of agreed facts which came later will prevail as far as their stand is concerned.

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[16] In *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417; [2000] 4 CLJ 811 in arguing that the plaintiff cannot resile from the position it took when it withdrew the originating summons. Shaik Daud JCA at pp 822–823 had this to say:

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We are of the view that in the light of the uncontradicted evidence of repeated acknowledgements of the appellant as a scheme creditor, the learned judge ought to have applied the doctrine of estoppel against the respondent. Up to 20 September 1999, the respondent had, by their words and conduct, allowed and even to a certain extent, encouraged the appellant to proceed on the basis and understanding that the respondent had accepted the appellant as a scheme creditor. The respondent had, therefore, led the appellant to harbour a legitimate expectation that it was a scheme creditor, and it would be unconscionable and unjust for the respondent to assert afterwards that the appellant was not. In other words, the respondent ought not to be allowed to approbate and reprobate. We refer to *Halsbury's Law of England* (4th Ed) vol 16 para 1507:

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1507. Approbation and reprobation. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

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In *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, the court approved the following passage from Spencer Bower and Turner on *Estoppel by Representation* (3rd Ed 1977 pp 157–160):

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This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be

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A estopped as against the other from questioning the truth of the statement of facts so assumed.

The writer described such an estoppel as an estoppel by convention.

B See also *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206; [1996] 4 CLJ 141. We are of the view that in the present case there were sufficient material before the learned judge for him to hold that it would be unconscionable and unjust to allow the respondent to resile from their course of conduct and by such conduct is estopped from denying that the appellant is an unsecured creditor.

C Based on the authority above, I do not think the defendants can change their stand midway. They are bound by what they have agreed upon.

D [17] In *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 at p 923 Ramly Ali JCA (as he then was) referring to the admissions made by the respondent he held:

E The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402 (subsequently affirmed by the Court of Appeal in *Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hui Chang Pee)* [2011] 6 MLJ 193; [2010] 1 LNS 1269) as follows:

F (2) The plaintiff is entitled to rely on the defendant's affidavit filed in Suit No 22-18-96 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admission are admissible against the party making them.

G Further in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, Mahadev Shanker JCA held as follows:

For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.'.

H No doubt the Court of Appeal was addressing the admissions in the pleadings, I think that there is no reason why it should not be extended to statement of agreed facts.

I [18] PW2 was further cross-examined that as land owner the plaintiffs have a duty to take steps to prevent erosion or intrusion of water. PW2 in response said as follows:

PW2: No because there was signboard put up on the Lot 3749, 3752, 3754, 3817. They are written there: 'Amaran Kawasan Reserve JPS', those area we are not allowed to do anything it is JPS land, their land.

(NOP p 84 line 44).

Exhibit P44 the police report lodged by PW2 alleging that the signboard was removed after this suit was filed. This fact was not challenged by the defendants. What the defendants attempted to do was putting it to PW2 that he could not prove that the JPSP people who put it there. The cross-examination went on this way:

PD1: Alright. So can it be correct to say that anybody can put signboards there?

PW2: No, it is something against the law, if you are acting.

PD1: So I put it to you that anybody include the villagers or the squatters that happen pass through the areas they saw the signboard they can just put there? Do you agree?

PW2: No because JPS maintaining the gate and lot of officers going up and down.

(NOP p 86 line 43–47 and p 87 line 1).

I do not think it is proper for learned counsel for the defendant to put this statement to PW2 as the former has no basis to support this fact. At most he could only suggest. Be that as it may, why would the villager or anyone else place the signboard there? And why was it removed when the suit was filed? If the defendants strongly feel that those areas are river reserve, then they should maintain it there. Going by the circumstances, to my mind, this is a strong telling evidence against the defendants.

[19] The plaintiffs called an expert witness ('PW3') in public drainage and flood mitigation works to study and investigate the construction of the waterway, the earth embankment and the impact they have on the land in connection with Jabatan Pengairan dan Saliran's project known as Pembangunan Pertanian Johor Barat — Pembinaan Benteng dan Pengaloran Sungei Pinggan. His report was produced and tendered as exh P43. According to him before the acquisition in 1967 the land were planted with oil palm. However, after the first acquisition exercise which resulted in the construction of the embankment, the unacquired land experienced flooding during high tides and became floodplain. Lots 2193 and 2194 suffered the most due to back water flow of salt water into the realigned Sungei Pinggan whilst Lots 2195 and 2196 were constantly inundated. He inspected the sites on 27 June 2014 and took samples of water and have them tested. He concluded that the four lots were subjected to constant flooding, have high salinity and acidity content in the soil, surrounded by river and drains and have limited accessibility. He described this as 'flooding encroachment'. The unacquired

A lots were useless — almost a total loss. PW3 further described the other intrusion where the realigned Sungei Pinggan has permanently encroached the said land which he described as ‘land encroachment’. The affected portions are where Kampung Nelayan Benut is situated within Lots 2193 and 2194; Lots 2195 and 2196 (the green coloured areas in exh P12).

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C [20] PW3 further testified on how the address the problem where he recommended that retaining walls to be constructed along the boundary of the land and the embankment for the land encroachment. In respect of the flooding encroachment he suggested a reinforced concrete retaining wall. The costing according to him were as follows:

- (a) the cost for encroachment protection works in relation to land encroachment amount to RM9,126,562;
- D** (b) the cost for flood mitigation works in relation to flooding encroachment amount to RM2,880,600; and
- (c) the cost of drainage works to avoid water logging due to the construction of the flood mitigation retaining wall would be RM1,330,000.

E [21] PW5 who had since retired was the assistant land officer with PTP and he prepared exhs P12/P45 (both are the same plan) and P13 which is a report pertaining to the differences in the measurements based on the *pelan akui* done by Jabatan Ukur dan Pemetaan Malaysia Johor (‘JUPEMJ’) after the acquisitions. Therein he described the amount of land area which were overutilised by Jabatan Parit dan Saliran. He prepared exh P17 earlier and subsequently some mistakes were discovered which prompted him to come up with another report marked as exh P13. According to PW5 all in all for the land in question the shortfalls amount to 3 acres 2 rods and 38 poles. Plan marked

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G P12/P45 show the areas acquired.

[22] I need to mention again here that the defendants are not disputing the calculations found in P13 as reflected in their statement of defence in particular para 10. Hence, the shortfalls are admitted. It is also not disputed that in encl E (facts admitted) in para 8 that the areas described in *Jadual B* were being used as floodplain. That represents the 16.7895 acres.

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[23] PW7, the maker of exh P16 was called by the plaintiff where PTP put up the suggestion to further acquire the overutilised areas.

I [24] PW8 testified in respect of exh P19 where JPSP admitted the overutilisation and stressed that those areas ought to be acquired as the said portions were needed by JPSP. His evidence went on to explain why the acquisitions took place. According to him the whole area was flooded due to

overflow from Sg Benut. He drew up a map which is enclosed in exh P20 to explain this. The canal was dug to realign Sungei Pinggan in order for both rivers to meet. In answer to a question from the court, PW8 said even after the embankment was constructed water will overflow when it was high tide and the said area will be flooded.

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[25] PW10 a licensed land surveyor prepared a survey plan exh P55. Based on P55 he described the yellow and brown coloured portion as the unacquired portions. The blue coloured is the acquired portion. The green coloured is the encroached portion. He also prepared exh P56 which was according to him a spot level and topography survey plan. He explained the damage done and it was consistent with exh P19 which was issued by JPSP.

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The defendants' case

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[26] The defendants called two witnesses. DW1, the deputy director of JUPEM took the stand and gave evidence based on a report ('exh D59') which was prepared as a result of the meeting held on 8 December 2014. Appendix A shows the survey conducted pertaining to the land acquisitions dated 13 April 1975. Appendix B is similar to exh P18. Appendix C contains the 'Hasil siasatan dan ukuran demakarsi serta butiran di lapangan'. The conclusion can be found in Item E of the D59. He further described that the green coloured area was then submerged in 1975 and he claimed that it was part of the river hence, it was not surveyed and not included in Appendix A. In 2014 where the wooden houses were seen in Appendix C within the green coloured area in exh P12 was still in the same condition. The portions described as barren in Appendix A in 1975 was exposed to high tide and in 2014 was submerged. While under cross-examination he admitted that survey done in 1975 was not complete in that the green coloured area was not included in particular the part of Lot 2193 and further admitted that the green coloured area was not submerged but a dry area. DW1 further admitted that a total of 3.7373 acres in Appendix B should be returned to the plaintiffs.

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[27] The defendants called the Pengarah Bahagian Pengurusan Lembangan Sungai, Jabatan Parit dan Saliran Malaysia (DW2) as their second and last witness. He was referred to exh D59 and in particular under Item C para (ii) of all the *pelan akui* and he stated that by virtue of s 49 of the National Land Code ('the Code') the land encroached by water from the river would become state land. He further stated that the green coloured portion in exh P57 (similarly in P12) was not shown in Appendix A but shown in Appendix C of exh P59 but the boundary mark was in the waters hence it is state land, so he said. Apparently his evidence relied quite a lot on documents prepared by someone else. And his evidence, to my mind, cannot disprove the evidence that the green coloured area was a dry land where the wooden houses were found thereon.

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- A [28] PW3 and PW10 are no doubt expert in their respective field and I have no reason to reject their evidence particularly so when the defendants did not bring any expert to rebut them. Although DW1 has the necessary qualifications as a surveyor his evidence failed to rebut PW3's evidence. For example, in respect of the green coloured area where earlier on he said that that area was submerged therefore it was not included in the 1975 survey. However, when he was confronted with exh P23B, the certificate of title for Lot 2193 and exh P30F ie Plan 16821, he admitted that the green area was dry. Obviously in coming to the conclusion he made he did not refer to other material documents available.
- B
- C [29] In *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 at p 23 the Supreme Court held:
- D It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence.
- E Therefore, in the absence of a rebuttal from an expert appearing on behalf of the defendants, I have no choice but to accept the evidence of PW3 and PW10, whose evidence I find nothing improbable as they were not seriously challenged in cross-examination. In *Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408, Chao Hick Tin JA speaking for the Court of Appeal stated,
- F In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds.
- G [30] DW3 came to re-state the purposes of the acquisition exercises on the land which the court has been told earlier during the plaintiffs' case. The only evidence which he gave that may overturn the plaintiffs' case pertains to the provision of s 9 of the Code.
- H [31] Even if I were to accept the evidence of DW2 on the effect of s 49 of the Code the next thing the court would normally expect to hear is whether any action had been taken under s 382A of the Code which reads:
- I 382A Actions in relation to documents of title where alienated land becomes State land under section 49
- (1) The Land Administrator shall upon being satisfied that any alienated land or part thereof has become State land under section 49, make or cause to be made a memorial to that effect in the register document of title to the land.

- (2) The Registrar shall after making a memorial under sub-section (1) — A
 - (a) notify the proprietor thereof of the making of such memorial,
 - (b) call for the production of the issue document of title in accordance with section 15, and
 - (c) make the like memorial on the issue document of title or, in the case B where the whole land has become State land, destroy the subsisting issue document of title.
- (3) Where the whole land has become State land upon the making of any C memorial under sub-section (1), the subsisting register document of title and any subsisting issue document of title which has been destroyed pursuant to paragraph (c) of sub-section (2) shall be deemed to have been cancelled and no entry shall thereafter be made therein'.

I could not find anywhere in DW1 or DW2's evidence mentioning that such memorial had been made. Therefore, I do not think the defence of the land being reverted and vested in the state authority can succeed. D

[32] In *Tan Wee Choon v Ong Peck Seng & Anor* [1986] 1 MLJ 322 at p 323, Wan Yahya J (as he then was) had this to say, E

Trespass to land unlike criminal trespass is completed once a person wrongfully, albeit peaceably, intrudes into the land in the possession of another, even where no damage is done. Trespass to land covers all unlawful entry and includes taking possession, pulling down or destroying anything permanently fixed to the land. The following passage on what constitutes trespass to land is found in *Halsbury's Laws of England* (3rd Ed), Vol 38 at p 739: F

Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land. G

Even if damages need be proved, there is in my finding sufficient evidence of it in our present case. Tearing down fence, threatening workers engaged in erecting it and driving vehicles up and down right in the middle of another man's land and depriving the owner of his right to conduct his business on his land, in my opinion, constitute sufficient damage to the landowner. H

[33] In the light of the evidence of the government officials from the PTP, JPSP and the *pelan-pelan akui* issued by and approved by the Pengarah Jabatan Ukur Johor, there is clear evidence of overutilisation and trespass of the 3.7373 I

A acres and trespass over the 16.7895 acres of the land belonging to the plaintiffs.

[34] In *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515 at p 533 Mokhtar Sidin JCA held:

B Trespass was committed before and after the respondent took possession of the said land and it was a continuing trespass which ceased when the crib wall was constructed and completed, well after the respondent came into possession of the said land. Since there was no evidence that the previous owner of the said land knew of the trespass, it could not be said that the trespass committed by the appellant was done with the consent of the previous owner or that he had condoned it.

C

Further down at p 535 the learned judge continued to hold as follows:

D The situation in the present appeal, in my view, is worse not only the appellant committed trespass on the said land when the respondent took possession of the land but the excavation by the appellant which seriously affected the said land was never remedied which rendered part of the land useless. When the respondent came into possession of the said land there was evidence to show that the appellant was excavating the access reserve and in that process intruded into the respondent's land. There was also evidence that because of the excavation of the access reserve the respondent's land could not have access from the access reserve permanently. The appellant did not deny this. In my view, as long as the condition of the said land remained the same the trespass is continuing. In view of the continuing trespass, it does not matter whether the respondent was in possession of the said land when the first incident of trespass took place. It was not disputed that the respondent came into possession when the excavation was still being carried out by the appellant.

F

G [35] The state of affairs remains until today and therefore, I find that the trespass is continuing. It is just unfortunate that the plaintiffs when they purchased the land they did not realise the existence of these problems. To my mind it does not matter, overutilisation and trespass remain to have been committed subsequent to the first acquisition until present. The plaintiffs requested that the land to be further acquired. The JPSP made similar recommendation but was ignored. As such I am of the view that this is a fit case for exemplary damages to be awarded based on the principles enunciated in *Rookes v Barnard* [1964] AC 1129 which was re-affirmed by the House in *Cassell v Broome* [1972] AC 1027.

H

[36] In the circumstances, my findings are summarised as follows:

- I
- (a) the first defendant has committed trespass over the 3.7373 acres of land from Lots 2193, 2194, 2195, 2196 and 2199;
 - (b) damage is proven;
 - (c) the first defendant has committed trespass over the 16.7895 acres and it is continuing;

- (d) damage is proven; and A
- (e) that the first defendant is liable and third defendant is vicariously liable over the acts of the first defendant.

[37] Therefore, I allow the plaintiffs claim and hereby make the following orders: B

- (a) general damages to be awarded as per sub-paras 21(i)(a) and (b); and (iii); and
- (b) exemplary damages only as per sub-para 21(iv). C

[38] The damages are to be calculated from the date of purchase by the plaintiffs and to be assessed by the senior assistant registrar of the High Court of Johor Bahru with interests to be awarded as per sub-para 21(vi). Costs of RM100,000 for the plaintiffs. D

Plaintiffs' claim allowed with costs of RM100,000.

Reported by Dzulqarnain Ab Fatar E

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